himself could have interpleaded in the manner prescribed by Order XLV.

In view of the fact that this procedure was not followed the applicants were called upon to pay the money over to the sheriff in circumstances where they could validly have refused to do so and asked for the issue to be tried. They, however, paid up and sought to get the order of 27th May, 1964 set aside.

I have come to the conclusion that, if the correct procedure had been followed, the sheriff would not have found himself in his present position and that if the applicants had seen the flaw in the procedure they could have easily avoided getting themselves involved in the matter as they did.

The sheriff is an officer of the court and so is the registrar. It so happens that these offices are sometimes vested in the same person and that that officer performs dual functions without necessarily having to develop a "split personality". When the registrar received the draft of the order of 6th June, 1964 for approval there was nothing to prevent his drawing the judge's attention to Item 117 before allowing the order to be taken out. I do not think that any allegation of impropriety could have been made against the registrar for taking such a course because he would merely be attempting to draw the judge's attention to some mandatory provision of the law which he thought everybody had overlooked. The judge would then, if necessary, have considered the matter and either confirmed his order or recalled the parties with a view to considering what his order should be in view of this new aspect. There is authority, I think, for the proposition that before an order is actually taken out it may be reconsidered in a case where some matter of prime importance appears to have been overlooked.

Whether I am right or wrong in the observation in the preceding paragraph I am satisfied that the present impasse arose through failure to comprehend the true effect of the order of 27th May, 1964 on the part of all concerned.

In the circumstances I propose to give a direction to the sheriff that the commission in question should be returned to the applicants without my making any order for attachment against him for contempt, and I do not, therefore, propose to make any order as to costs.

Order accordingly.

Solicitors: *Chung & Co.*

RE MUTHUKARUPPAN CHETTIAR DECD.

[O.C.J. (Hepworth J.) May 7, 1965]

[Penang — Originating Petition No. 4 of 1964]

Revenue — Estate duty — Gift inter vivos by testator by way of deposit of moneys in firm — Gifts confirmed by declarations of trust and last will of testator — Passing of property on death — Whether testator as trustee had bona fide possession and enjoyment of property — Whether testator retained property to the entire exclusion of himself as donor — Estate Duty Enactment, 1941, s. 5(iii).

In 1954 the deceased who was a partner in a chettiar firm caused a sum of $15,000 to be placed on fixed deposit with the firm for each of the four infant children of the petitioner, his adopted son. In 1955 the deceased confirmed the gifts by separate documents referred to as deeds of trust. The deceased died on October 20, 1961 and by his will dated April 12, 1961 the deceased further confirmed the gifts to the infants. The collector of estate duty who is the respondent, claimed and obtained estate duty on the said gifts on the ground that the gifts *inter vivos* were deemed to be property passing on the death of the deceased within the meaning of section 5(iii) of the Estate Duty Enactment. The petitioner maintained that this was wrong because (a) the gifts were perfected by the declarations of trust (b) *bona fide* possession and enjoyment of the gifts were assumed by the donees through the donor as trustee immediately on the execution of the declaration of trust and (c) such possession and enjoyment were thenceforth assumed by the donees through the donor as trustee to the entire exclusion of the donor.

Held: the deceased did on the facts of this case assume *bona fide* possession and enjoyment of the gifts as trustee immediately on the execution of the declarations of trust but as these sums were used generally in the running of the business of the firm of which the deceased was a partner the deceased could not be said in fact to have been excluded from the property under section 5(iii) of the Enactment because as a partner he enjoyed rights over it. The sums therefore on fixed deposit in the said firm in the names of the infants at the date of the deceased's death were sums which were deemed to pass on the death of the deceased by virtue of the said section of the Enactment.

Cases referred to:—

(1) *Vandenberg* v. *Palmer* (1858), 70 E.R. 85.

(2) *Attorney-General* v. *Grey* [1898] 2 Q.B. 534.

(3) *Attorney-General* v. *Seccombe* [1911] 2 K.B. 688.

(4) *Jeffreys* v. *Jeffreys* 41 E.R. 443.

(5) *Milroy* v. *Lord* 45 E.R. 1185.

(6) *Re Wale* [1956] 3 All E.R. 280.

(7) *Gould* v. *Commissioner of Stamp Duties* [1934] A.C. 69.

(8) *Kumarappa Chettiar* v. *Federated Malay States* [1938] M.L.J. 9; [1937] F.M.S.L.R. 56.

(9) *Chick* v. *Commissioner of Stamp Duties of New South Wales* [1958] A.C. 435.

(10) *Commissioner of Stamp Duties of New South Wales* v. *Permanent Trustee Co. of New South Wales* [1956] A.C. 512.

(11) *Commissioner of Stamp Duties of New South Wales* v. *Owens* (1953), 88 C.L.R. 67.

(12) *O'Conner* v. *Commissioner of Stamp Duties (South Australia)* (1932), 47 C.L.R. 601.

ORIGINATING PETITION.

S. Thillaimuthu for the petitioner.

Au Ah Wah (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Hepworth J.: S. M. M. Muthukaruppan Chettiar son of Muthukaruppan Chettiar (hereinafter called the deceased) was a partner in a firm known as S. M. M. (hereinafter called the said firm) having its office at No. 17, Jalan Ibrahim, Sungei Patani, Kedah, from its commencement on the 6th July, 1927.

The petitioner, who is the adopted son of the deceased, became a partner in the said firm on the 5th June, 1935, and has from time to time managed the said firm and is now managing it.

The petitioner has four sons (hereinafter called the infants) M. M. SP. Krishnan, born on the 30th July, 1948, M. M. SP. Ramanathan, born on the 8th March, 1950, M. M. SP. Vengadasalam born on the 2nd March, 1952, and M. M. SP. Sornanathan, born on the 2nd December, 1953.

On the 10th June, 1954, the deceased caused a sum of $15,000 for each of the infants to be placed on fixed deposit in the said firm for the use of the infants and such sums were forthwith credited to the separate accounts of the infants in the books of the said firm at the customary Chettiar "Thavannai" rate of interest.

On the 7th April, 1955, the deceased confirmed the said gifts to the infants by executing separate documents referred to as deeds of trust and the monies according to his directions remained on fixed deposit in the said firm and still so remain, and interest thereon has been credited from time to time. All these deeds of trust are similarly worded and the operative parts read as follows:—

"This deed of declaration made this 7th day of April, 1955, between (1) S. M. M. Muthukaruppan Chettiar, son of Muthukaruppan Chettiar, Hindu, moneylender, Nattukottai Chettiar Caste, Saivite, aged about 65, residing at Devakottai, Ramnad District, South India, and (2) Minor Krishnan (grandson of party No. 1) represented by his mother and guardian SP. Sornavalli Achi (wife of Subramaniam Chettiar), Hindu. Nattukottai Chettiar Caste, Saivite, aged about 7 also residing at Devakottai, Ramnad District, South India, witnesseth as follows:—

Whereas the party No. 1 gifted to party No. 2 on the 28th Vaikasi, Jaya (10.6.54) a sum of $15,000.

That the said sum remains in deposit with the S. M. M. Firm, Sungei Patani, Kedah State, Malaya.

That party No. 2 and his heirs are the absolute free owner of the sum standing in deposit with its accumulations — thereto in the S. M. M. Firm, Sungei Patani Kedah State, Malaya.

That the party No. 1 has no right whatsoever from the date of gift in the gifted property.

That the party No. 2 accepted the gift.

That necessary book adjustments in respect of the above transactions have already been fully and duly effected."

The deceased died on the 20th October, 1961, leaving a will dated the 12th April, 1961, naming the petitioner as sole executor thereof. Probate of the said will was granted in the High Court, Penang, to the petitioner on the 6th July, 1964, and extracted on the 9th July, 1964.

In paragraph 13 of his said will the deceased confirmed the said gifts to the infants in the following terms:—

"Among my grandsons Krishnan 1, Ramanathan 2, Vengadasalam 3, Swarnanathan 4. respectively have already been given by me, individually, equal cash gifts and these respective amounts have been placed in credit in their respective names in the firm of S. M. M. in Sungei Patani for aggregate benefits. Each (such gift) has to this date aggregated to $20,000 approx."

On the 16th April, 1962, the petitioner filed a petition addressed to the collector of estate duty, Malaya, showing the assets and liabilities of the estate of the deceased and claiming to be allowed, *inter alia*, the gifts *inter vivos* made by the deceased to the infants free of estate duty. The amount of each of the gifts to the infants with accumulation of interest as at the date of death of the deceased was $21,271.92.

By a letter dated the 12th November, 1963, the collector of estate duty disallowed the gifts *inter vivos* to the infants for the purpose of estate duty and treated them as property passing on the death of the deceased on the ground that though three years had elapsed since the date of those gifts they were gifts of which *bona fide* possession and enjoyment were not assumed by the donees immediately upon the gifts and that they were not retained to the entire exclusion of the deceased.

By a notice dated the 7th December, 1963, the respondent required payment of duty on the aforesaid gifts *inter vivos* to the infants.

The petitioner being aggrieved by the collector's claim for estate duty on the said gifts *inter vivos* to the infants filed through his solicitor on the 11th January, 1964, a notice of intention to apply to the court for relief under section 43 of the Estate Duty Enactment, 1941, (hereinafter referred to as the Enactment).

The respondent by a letter dated the 14th April, 1964, maintained the claim for estate duty on the said gifts *inter vivos* made to the infants. A notice of assessment dated the 25th April, 1964, was duly forwarded by the respondent and the estate duty and interest referred to therein have been paid by the petitioner.

Subsection (iii) of section 5 of the Enactment reads as follows:—

"5. Property passing on the death of the deceased shall be deemed to include the property following, that is to say

". . . . . .

"(iii) Property taken as a *donatio mortis causa* made by the deceased, or taken under a disposition made by the deceased purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise which shall not have been *bona fide* made three years before the death of the deceased, or taken under a gift whenever made of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise:

"Provided that . . . . . ."

The petitioner claims that the respondent's decision that the gifts *inter vivos* to the infants are deemed to be property passing on the death of the deceased within the meaning of section 5(iii) of the Enactment is wrong on the following grounds:—

(i) That the said gifts were in law made perfect by the respective declarations of trust in writing dated the 7th April, 1955, concerning the same.

(ii) That *bona fide* possession and enjoyment of the said gifts were assumed by the donees through the donor as trustee immediately on the execution of the respective declarations of trust.

(iii) That such possession and enjoyment were thenceforward assumed by the donees through the donor as trustee to the entire exclusion of the donor or of any benefit to him by contract or otherwise and accordingly no estate duty is payable on the said gifts.

Subsection (iii) of section 5 of the Enactment expressly contemplates immediate gifts made by way of declaration of trust. The petitioner submits that each declaration of trust shows an immediate intention to transfer the property. A trust never fails for want of a trustee (*Underhill's* Law of Trusts and Trustees, 11th Edition, page 21). The donor has constituted himself a trustee by implication and no precatory words are needed. (*Vandenberg* v. *Palmer* [1]). Once a trust has been declared it is immaterial that the donor himself is the trustee.

The respondent submits that the documents referred to by the petitioner as declarations of trust are not declarations of trust but are simple contracts endeavouring to give away property without consideration. Nowhere in these documents is anyone appointed as a trustee. He submits that there are two requirements:—

(1) Assumption of possession and enjoyment of the subject matter by the donees, and

(2) Final and entire exclusion of the donor from such possession and enjoyment.

He submits that it is not sufficient that the donees have the right to actual possession and enjoyment. Although there was a book entry in the books of the firm transferring the sum of $15,000 there was nothing to stop their re-transfer at any time by the deceased who was in charge of the firm. He says that the money in the books of the firm was never handed over to anyone and was always in the donor's firm and under his control.

The money in the firm, the respondent says, has never been excluded from the donor because he had control over the firm at all times. If in fact there was a trust, which he denies, the money has never been handed over to a trustee.

In support of his submission that there must be assumption of possession and enjoyment of the subject matter by the donee the respondent quotes *Attorney-General* v. *Grey,*[2] *Attorney-General* v. *Seccombe,*[3] *Jeffreys* v. *Jeffreys,*[4] *Milroy* v. *Lord* [5] and *Re Wale.*[6]

In support of his submission that it is necessary for there to be final and entire exclusion of the deceased from the possession and enjoyment of the subject matter by the donee he quotes *Gould* v. *Commissioner of Stamp Duties* [7] and *Kumarappa Chettiar* v. *The Federated Malay States.*[8]

The petitioner however distinguishes these cases from the present case. In *Attorney-General* v. *Grey,* he says, the enjoyment of the subject matter by the donee was subject to seven conditions. In *Attorney-General* v. *Seccombe* it was subject to the payment of an annuity to the donor. In *Jeffreys* v. *Jeffreys* it was also subject to the payment of an annuity. In each of these cases there were covenants by the donees that they would look after the donors in consideration of the gift to them. The possession of the subject matter was not therefore enjoyed to the entire exclusion of the donor in those cases.

A donor may render a voluntary settlement valid and effectual by a declaration of trust. In *Milroy* v. *Lord* it was held that an instrument or transaction intended to operate as a voluntary assignment or a gift, but invalid as such, will not constitute the assignor or donor a trustee of the property for the intended assignee or donee. In order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may do so by actually transferring the property to the donees, or to trustees for the purposes of the settlement, or by declaring that he himself holds in trust for those purposes. There is no equity in the court to perfect an imperfect gift. But the petitioner submits that the deceased has done everything necessary and he is not invoking the aid of equity.

In *Re Wale* there was no question of a declaration of trust.

The respondent submits that the facts in *Gould* v. *Commissioner of Stamp Duties* are almost on all fours with the present case. But in that case neither the property, the subject of the trust, nor the trust alleged to have been declared could be ascertained with sufficient precision to justify the inference of the existence of a trust. It followed therefore that the settlements could not be treated as gifts perfected either by transfer of property or declaration of trust. That is not so in the present case.

In *Kumarappa Chettiar's case* there was no question of a trust having been declared, the only evidence of any sort being entries in the books.

In addition to the gifts to the infants the deceased executed similar declarations of trust in respect of gifts *inter vivos* made by him to his daughters M. Sornavalli Achi and M. Valliammal Achi. At the date of the deceased's death the amounts of these gifts with accumulations of interest standing to their credit on fixed deposit in the said firm were $10,984.72 and $20,375.24 respectively. Both the said daughters were then of full age. Both these amounts have been allowed by the respondent free of estate duty on the ground that the donees assumed possession by the drawing of monies from the deposits with the said firm.

The only differences between the gifts *inter vivos* to the infants and the gifts *inter vivos* to the said daughters are that the infants are minors and the said daughters are of full age and the infants have drawn nothing from their deposits with the said firm and the said daughters have.

In relation to the gifts *inter vivos* to the infants the deceased did in my opinion on the facts of this case assume *bona fide* possession and enjoyment of the said gifts as trustee immediately on the execution of the respective declarations of trust. Sub-section (iii) of section 5 of the Enactment, however, provides that not only must *bona fide* possession and enjoyment of the property have been assumed by the donee immediately upon the gift but also thenceforward retained to the entire exclusion of the donor. The crux of the matter is the entire exclusion of the deceased from the property.

On the question of the entire exclusion of the deceased from the property I think that the main points in the judgment of the Privy Council in the case of *Chick* v. *Commissioner of Stamp Duties of New South Wales*,[9] a decision on a similarly worded clause of a New South Wales statute, are of assistance. In *Dymond's* Death Duties, 13th Edition, Volume I, page 214, these points are referred to as follows:—

> "In this case the deceased gave his son a farming property, 'Mia Mia', in 1934; in 1935 the deceased, the son and another son entered into a partnership agreement as graziers and stock dealers, on the terms, *inter alia*, that the deceased should be the manager and that his decision should be final in all matters relating to the conduct of the business; that the capital should consist of the livestock and plant owned by the partners; that the business should be conducted on their respective holdings (including 'Mia Mia'); and that the land held by each partner should be his sole property and he should have the sole and free right to deal with it as he might think fit. The partnership continued till the death of the deceased in 1952, and the property 'Mia Mia' was held dutiable as a gift not to his entire exclusion. The main points were:—
>
> (1) The deceased was not in fact excluded from the property, but as a partner enjoyed rights over it.
>
> (2) There was an initial outright gift of the property — not of the property shorn of certain rights. (Contrast *Munro* v. *Commissioner of Stamp Duties (New South Wales)* [1934] A.C. 61, P.C.: see p. 224, *infra*.).
>
> (3) It was immaterial that the partnership agreement was later than the gift, since the section required that possession and enjoyment should 'thereafter' be retained to the exclusion of the donor (cf. the *Permanent Trustee Co., etc., case, infra*, p. 217).
>
> (4) . . . . . ."

Chick's case has been overruled in England and Northern Ireland by statute but that does not minimise the force of the arguments contained therein relating to the wording of a statutory provision similar to the wording of subsection (iii) of section 5 of the Enactment.

There is no evidence that the placing of the sums of $15,000 for each of the infants on fixed deposit in the said firm was other than a book entry in the said firm's accounts. It is clear that these sums were used in the business of the firm because interest was earned on such sums and credited to the separate accounts of the infants. These sums were used generally in the running of the business and one of the partners in the firm who were running the said firm's business was the deceased. The deceased could not therefore be said in fact to have been excluded from the property because as a partner he enjoyed rights over it.

The fact that interest on these sums was credited to the separate accounts of the infants does not in my opinion affect the issue. It appears from *Commissioner of Stamp Duties of New South Wales* v. *Permanent Trustee Co. of New South Wales*,[10] *Commissioner of Stamp Duties of New South Wales* v. *Owens*,[11] *O'Connor* v. *Commissioner of Stamp Duties (South Australia* [12]) and *Chick's case* that the provision that the deceased must be entirely excluded from the property may be infringed if the donor either (a) occupies or (b) enjoys the property or (c) enjoys the income from the property even though he has no right to do so which he could legally enforce against the donee. (*Dymond's* Death Duties, 13th Edition, page

218). I am aware that these cases are cases in which the property concerned was land. The principle, however, appears to me to be the same whatever form the property takes.

The sums therefore on fixed deposit in the said firm in the names of the infants at the date of the deceased's death are, in my opinion, sums which are deemed to pass on the death of the deceased by virtue of the provisions of sub-section (iii) of section 5 of the Enactment and accordingly the petition is dismissed with costs.

Petition dismissed.

PONNUDURAI v. JAYATILEKA

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) May 13, 1965]

[K.L. — Federal Court Civil Appeal No. 108 of 1964]

Landlord and tenant — Recovery of possession — Reasonableness — Requirement of — Absence of — Claim for double rent — Control of Rent Ordinance, 1956. ss. 12(1)(f) and (n) and 22.

The plaintiff-appellant claimed recovery of premises belonging to him and occupied by the defendant-respondent and for double rent. The plaintiff was a clerk who had reached the age of 55 years and the ground relied was that he required the premises for his own occupation. The magistrate made an order for possession and for payment of double rent in favour of the plaintiff but on appeal this order was set aside ([1965] 1 M.L.J. 131). On further appeal to the Federal Court,

Held: (1) the magistrate erred in making the order for double rent;

(2) the requirement of reasonableness for an order to be made under section 12(f) of the Control of Rent Ordinance was absent in this case and therefore the application should have been dismissed by the magistrate.

Case referred to:—

(1) *Ong Keng Huat* v. *Shaw and Shaw Ltd.* [1957] M.L.J. 46.

FEDERAL COURT.

L. P. Thean for the appellant.

R. Chelliah for the respondent.

Cur. Adv. Vult.

Tan Ah Tah F.J.: In this case the plaintiff, who is the landlord of premises No. 17 Jalan Inai, Kuala Lumpur, sued the defendant, who is his tenant, for recovery of possession of the premises and for double rent as from the 1st May 1963 up to the date of recovery of possession. The action was heard in the magistrate's court, Kuala Lumpur and on the 16th May 1964 the learned magistrate made an order that the defendant should deliver up possession of the premises to the plaintiff on the 30th November 1965 and in the meantime pay double rent as from the 1st June 1964.

The plaintiff thereupon appealed to the High Court against the magistrate's order, asking, *inter alia*, that the order be varied and that the plaintiff be given immediate possession of the premises. The defendant for his part lodged a cross-appeal which in effect asked that the magistrate's order be set aside.

The appeal and cross-appeal came on for hearing before Ong J., who, on the 4th November 1964, dismissed the appeal, allowed the cross-appeal and set aside the magistrate's order. The plaintiff now appeals to this court against the decision of Ong J.

So far as the claim for double rent is concerned, it is clear that the learned magistrate erred in making the order that the defendant should pay double rent to the plaintiff from the 1st June 1964. The fact that the learned magistrate so erred can be seen from the case of *Ong Keng Huat* v. *Shaw & Shaw Ltd.*[1] and the provisions of section 22 of the Control of Rent Ordinance, 1956. Counsel for the plaintiff has stated that he is not supporting the order for payment of double rent.

The facts of the case, so far as they are relevant to this appeal, may be briefly stated. The plaintiff is a clerk in the Accountant-General's Office. His total emoluments are $1,078 per mensem. He was 55 years of age at the time of the hearing in the magistrate's court and is due to retire on pension in 1969. On the 8th August 1960 he purchased the premises No. 17 Jalan Inai, Kuala Lumpur at the price of $20.000. These premises, to which the Control of Rent Ordinance, 1956 applies, were then and are still occupied by the defendant as tenant.

The defendant is a teacher in the Methodist Boys' School, Kuala Lumpur. His total emoluments are $1,185 per mensem. He was 57 years of age at the time of the hearing in the magistrate's court and is due to retire at the age of 60. He has been the tenant of No. 17 Jalan Inai since November 1938. For the past three years he has been suffering from hypertension and after-effects of coronary thrombosis and amoebic hepatitis. He is at liberty to retire now, if he wishes to do so, and he would in that event receive a lump sum of about $60,000 from the Employees' Provident Fund, but because he would not draw any pension he has decided to continue to work as a teacher in order to support his children.

The statement of claim in the action was so drawn that the plaintiff was able to rely on the grounds set out in paragraphs (f) and (n) of section 12(1) of the Control of Rent Ordinance, 1956. The relevant provisions of the Ordinance are as follows:—

"12. (1) No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely —

(f) where the owner of the premises reasonably